No. 82-1554

IN THE

Supreme Court of the United States

October Term, 1982

CHARLES E. STRICKLAND, *Superintendent, Florida State Prison;* JIM SMITH, *Attorney General of Florida; and* LOUIE L. WAINWRIGHT, *Secretary, Florida Department of Corrections.*

Petitioners,

v.

DAVID LEROY WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FORMER FIFTH CIRCUIT (UNIT B)

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the federal courts properly made an independent determination of the respondent's claim that he was deprived of effective assistance of counsel under the Sixth Amendment.

2. Whether petitioner was deprived of the effective assistance of counsel guaranteed in the Sixth Amendment when his trial attorney neglected to conduct any independent investigation into readily available information in mitigation of punishment and, as a consequence, failed to develop favorable evidence about petitioner's character, background, and mental state at the time of the crimes, for presentation at his capital sentencing hearing.

3. Whether a habeas petitioner is entitled to relief under the Sixth Amendment when he establishes that inadequate counsel's serious derelictions impaired or adversely affected the presentation of the

defense though not necessarily the outcome of the trial.

4. Whether the court of appeals, in assessing petitioner's claim of ineffective assistance of counsel at sentencing, properly concluded that the district court erred in admitting and considering testimony of the state trial judge concerning his own mental processes in imposing sentence and his belief as to the effect he would have given to the mitigating evidence that inadequate counsel failed to obtain.

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Respondent confessed, pled guilty and was convicted of three counts of first degree murder under Florida law. [Pet.

App. 4-7].[1] The critical proceeding for respondent -- the only state court hearing at which there were contested issues of law and fact -- was the sentencing phase of his capital case.

It is a basic, historical fact, found by the district court, that Mr. Washington's trial counsel, William Tunkey, ceased any serious preparation or investigation of Mr. Washington's case approximately one month after being appointed, because he was immobilized by a "hopeless feeling" upon learning that Mr. Washington had confessed to two capital murders in addition to the one on which Mr. Tunkey was representing him. [Pet. App. 264; J.A. 380, 382-84, 426].[2] Mr. Tunkey

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1/ The Appendix of Petitioner on Jurisdiction will be referred to as "Pet. App."; the Joint Appendix will be referred to as "J.A.".

2/ The petitioners' selective presentation of the record in their Statement of the Case is at odds with the findings of

acknowledged that, after these confessions, he did not feel that "there was anything which [he] . . . could do which was going to save David Washington from his fate," [J.A. 400][3], and that his despair over the confessions resulted in a "cessation and end" to counsel's preparation. [J.A. 426].

The district court found that "this feeling was behind [Tunkey's] . . . failure

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2/ continued

the district court. The petitioners did not challenge the district court's findings as clearly erroneous. See F.R.C.P. 52(a); Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). The court of appeals essentially adopted the findings below. [Pet. App. 12-16].

3/ Mr. Washington surrendered to police on the first murder charge on October 1, 1976. [J.A. 255-57]. On October 7, 1976, Mr. Tunkey was appointed to represent Mr. Washington on the first murder charge and related crimes. [J.A. 372-73]. On November 5, 1976, Mr. Washington confessed to two additional murders. [J.A. 119-20, 123-39, 198-218]. On December 1, 1976, he pled guilty to three charges of capital murder and several other crimes. Petitioner's sentencing hearing was conducted on December 6, 1976, and he was sentenced to die on that date.

to do an independent investigation into petitioner's background and potentially mitigating emotional and mental reasons for the killings," [Pet. App. 282] as Mr. Tunkey admitted at the evidentiary hearing.[4] [J.A. 376; 388-89; 376-77].

Mr. Tunkey was aware of the strong likelihood that respondent would be convicted of three capital murders based on the confessions. But Florida's capital sentencing procedure involves two separate phases: a guilt phase and a separate sentencing phase "to determine whether the defendant should be sentenced to death or life imprisonment." Fla. Stat. Ann. §921. 141(1). At the time of respondent's convictions, Florida law provided that at this sentencing hearing "evidence may be

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4/ Prior to learning of the confessions, counsel had been directing his efforts toward pre-trial motions and discovery. He had not conducted any separate investigation or preparation for the sentencing phase. [Pet. App. 264; J.A. 376; 379-80].

presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated [in the statute.]" Id.[5] In July of 1976, several months before Mr. Washington's surrender to the authorities, the Court sustained the constitutionality of the Florida death penalty statute, in part because that statute requires the sentencer to focus not only upon the individual circumstances of the crime but also on the character of the offender. Proffitt v. Florida, 428 U.S. 242, 251,

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5/ Fla. Stat. Ann §921.141(1) (1983 Supp.) has since been amended and now provides:

> "In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in [the statute]."

252 (1976).

As the findings of the District Court make clear, Mr. Tunkey was utterly unprepared to represent Mr. Washington at this sentencing inquiry. Other than some conversations with Mr. Washington in jail, and some futile efforts to meet with Mr. Washington's wife or mother after briefly speaking with them on the telephone [Pet. App. 264-65], Mr. Tunkey conducted no investigation for witnesses who could have provided mitigating information about Mr. Washington's character and background. [Pet. App. 265]. Moreover, despite Mr. Tunkey's recognition that there was "an absolutely inexplicable difference between the personality [of Mr. Washington] which I knew as compared to the crimes charged and the admissions he had made,"[6] Mr.

6/ Pages 38-39 of the transcript of the evidentiary hearing in the district court

(footnote continues on following page)

Tunkey never sought to explore that discrepancy. He did not obtain any information relating to Mr. Washington's character and background from those who best knew him nor did he seek any psychiatric or psychological examination of Mr. Washington for evidence of statutory or non-statutory mitigating factors relating to his mental state at the time of the offenses.[7]

6/ continued

have been inadvertently omitted from the Joint Appendix. For the convenience of the Court, these pages have been reproduced in Appendix A to respondent's brief. The statement in the text appears on page 39 of the transcript of the evidentiary hearing in the district court, which is part of the record of the court of appeals.

7/ Two provisions of the Florida statute enumerate mitigating circumstances pertaining to a defendant's mental state: Fla. Stat. Ann. §921.141(6)(b) ("The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance"), and Fla. Stat. Ann. §921.141(6)(f) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired").

Having failed to conduct any independent investigation into Mr. Washington's character and background or to seek any expert evaluation of Mr. Washington's mental state at the time of the crimes, Mr. Tunkey testified that:

> I really could find very little to address myself to in terms of a relevant, cogent presentation of mitigating circumstances as outlined by the statute itself and certainly insofar as aggravating circumstances are concerned, I . . . did not feel exactly like I . . . had sufficient ammunition to persuade anybody that the State was not going to succeed in showing at least that they outweighed the mitigating circumstances. [J.A. 404].

He thus decided that at the sentencing hearing he would "attempt to convince the judge of Washington's sincerity and frankness in pleading guilty, recognizing the sentencing judge as a judge who had acknowledged his respect for individuals who came before him in the court and admitted their guilt." [Pet. App. 265-66;

J.A. 403]. After Mr. Washington entered his guilty pleas to three capital murders, Mr. Tunkey offered no testimony or any other evidence at the sentencing hearing in support of a life sentence, but relied solely upon brief statements made by Mr. Washington at the guilty plea proceedings. [J.A. 322].[8] In an argument at the close of the hearing that covers only three transcript pages [J.A. 320-24], Mr. Tunkey made no mention of Mr. Washington's family life or background; he did not suggest that there was any independent information about Mr. Washington's character and life history or mental state at the time of the crimes[9] that should be considered by

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8/ At these proceedings, Mr. Washington acknowledged his guilt and briefly referred to the pressure he was under at the time of the crimes. [J.A. 46, 52-53].

9/ Although Mr. Tunkey had asked the court in his sentencing memorandum to consider, as a mitigating circumstance,

(footnote continued on following page)

the sentencing judge.[10]

The record of the habeas proceeding establishes that there was a substantial amount of readily available evidence on the critical issue of whether Mr. Washington deserved to live or die. At the evidentiary hearing below, fourteen affidavits from Mr. Washington's neighbors,

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9/ continued

that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" (see note 7 supra), he made no explicit reference to the nature of Mr. Washington's mental state at the time of the crimes. Mr. Tunkey never requested a presentence report on Mr. Washington's mental state, social background or life history. The district court below found that such a presentence report "may have provided additional independent information in mitigation of the aggravating circumstances previously shown." [Pet. App. 280].

10/ The district court did not find counsel's perfunctory closing argument, standing alone, to be persuasive evidence of ineffectiveness but found that it had to be evaluated "in light of the mitigating circumstances which may have been advanced upon a more complete investigation." [Pet. App. 280-81].

friends, former employees, family members, and community members were introduced. [J.A. 338-65]. All of the affiants stated that they would have testified on Mr. Washington's behalf at his sentencing hearing but were never contacted by anyone involved in his defense.

These individuals all described David Washington as a responsible, nonviolent, young black man who did not use drugs or alcohol, was an active member of his church, was devoted to his family and eager to work, but was unable to find employment to support his wife and newly-born child. [J.A. 338-65]. They consistently expressed their belief that the David Washington they knew was not the type to commit a murder; many of them remarked that violent behavior was completely "out-of character" for him.[11]

11/ Leonard Brady, a Dade County police

(footnote continues on following page)

Two affidavits of medical experts -- a psychiatrist and a psychologist -- were also introduced at the habeas hearing. [J.A. 6-9; 10-16]. As the district court found, these experts provided "information relevant to the issue of mental or emotional stress"[12] at the time of the crimes.

11/ continued

officer, best summed up the prevailing view of these affiants when he observed:

> In all of the years that I have observed deviant behavior as a police officer, I have never seen anyone do something like David has done, with the history and character that David has. [J.A. 365].

12/ At Pet. App. 326, a portion of the district court's opinion containing this quote is omitted. The full passage can be found on page 58 of the record in the Court of Appeals and is as follows (omitted portions are underscored):

> Investigation in the psychiatric areas would undoubtedly have produced information relevant to the issue of mental or emotional stress. This is evidenced by review of the

(footnote continues on following page)

[Pet. App. 9].[13] In brief, the psychiatrist and the psychologist concluded that, while Mr. Washington was legally sane at the time of the crimes, his violent actions were attributable to the uncontrollable eruption of long-suppressed feelings of self-hatred and anger generated by exposure to extensive child abuse, incest and a broken and violent family situation, combined with the severe frustration and depression concerning his financial problems. Both doctors noted

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12/ continued

affidavits from friends, relatives and medical personnel who examined the petitioner in recent years.

13/ After the hearing, respondent submitted the affidavit of a second psychiatrist to the district court. This psychiatrist reported that, at the time of the crimes, Mr. Washington was under the influence of extreme mental or emotional disturbance, and that he was unable to conform his conduct to the requirements of the law. [See note 7, supra]. [J.A. 495-503]

that Mr. Washington expressed substantial remorse during their interviews with him. [J.A. 6-9; 10-16].

Based on this record, the district court found: (1) that counsel "made an error in judgment" by failing to conduct an adequate investigation into factors relevant to the mitigation of Mr. Washington's sentence, and (2) that such an investigation "would have produced generally favorable information from family, friends, former employers, and medical experts," [Pet. App. 282-83], about Mr. Washington's character, background, social history, and mental state at the time of the crimes. But for Mr. Tunkey's failure to seek out mitigation witnesses, this evidence would have been before the tribunal that decided whether Mr. Washington was to live or die.

Despite these findings, the district court denied the petition because it

concluded that a death-sentenced prisoner must shoulder the additional burden of establishing that the outcome of the sentencing hearing would have been different in the absence of counsel's derelictions of duty. [Pet. App. 286]. In reaching this conclusion, the district court employed a standard established by the plurality opinion in United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc) (Decoster III) and considered, but did not treat as determinative, the testimony of the sentencing judge who believed he would have still imposed the death sentence "even if he had considered the live testimony of character and psychiatric witnesses." [Pet. App. 285].

On appeal, a divided panel of the court of appeals reversed the judgment and remanded the case to the district court with directions to determine whether counsel's representation at the sentencing

phase had been ineffective and whether Mr. Washington had established prejudice -- i.e., "that but for his counsel's ineffectiveness, the sentencing phase, but not necessarily its outcome, would have been altered in a way helpful to him." The panel also held that, even if respondent satisfied this burden, the State could still show beyond a reasonable doubt that counsel's ineffectiveness was harmless and did not contribute to respondent's sentence. Washington v. Strickland, 673 F.2d 879, 906 (5th Cir. 1982) (Unit B).[14]

The en banc court of appeals[15] agreed

14/ The panel directed the district court, in assessing prejudice, "not [to] take into consideration [the sentencing judge's] testimony as to his mental processes in sentencing Washington or his speculation on how these processes might have differed had additional evidence been presented to him." Id.

15/ Six separate opinions were issued by the en banc court of appeals. Eight members of the court rejected the outcome-determinative standard of prejudice while three judges would have adopted that test.

with the panel that the case should be remanded to the district court for further findings on whether counsel's lack of investigation constituted ineffective assistance. The court of appeals held that, in assessing whether counsel breached the duty to investigate, the district court should decide whether the failure to investigate was based on a reasonable strategic choice to pursue one line of defense at the expense of another. [Pet. App. 54-55]. The court of appeals also held that, should counsel be found ineffective, the district court should then separately assess whether the habeas petitioner has established prejudice -- i.e., "actual and substantial disadvantage to his defense."[16] [Pet. App. 75, 81]. Finally, it held that, if the district court found actual and

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16/ This standard of prejudice is derived from United States v. Prady, 456 U.S. 152, 170 (1982).

substantial disadvantage, the State was still to be afforded the opportunity to establish that the ineffectiveness of counsel was harmless beyond a reasonable doubt. [Pet. App. 76, 82-83]. The en banc court agreed with the panel (see note 14, supra) that the portion of the sentencing judge's testimony relating to his mental processes in reaching the verdict was inadmissible and should not be considered by the district court on remand. [Pet. App. 76-81].

SUMMARY OF ARGUMENT

I. The federal courts were not bound by the state court determinations of effective assistance of counsel in this case. The state courts held no evidentiary hearings and made no determinations that could be termed findings of fact to be presumed correct under 28 U.S.C. § 2254(d). Rather, the district court appropriately made

initial findings of fact and the court of appeals acted correctly in independently addressing an issue of federal constitutional law under the Sixth Amendment.

II. Claims of ineffective assistance of counsel should be measured by Sixth Amendment principles. Thus, petitioners and, to some extent, the en banc court are in error in relying on principles derived from due process and procedural default cases. While the Due Process Clause guarantees a fair trial, the Sixth Amendment posits that assistance of counsel is a precondition to a fair trial. And the Court's procedural default decisions presume both a fair trial and competent counsel.

Similarly, the Court should reject the en banc court's rigid and categorical approach to claims of ineffective assistance of counsel. Assertions of inadequate performance by counsel arise in a variety

of factual settings; categorical rules would necessarily be imprecise and would divert the courts from the central inquiry of whether counsel has, in a particular case, performed within the range of competence expected of criminal attorneys. Rather, the court should set forth the governing factors, inherent in fundamental Sixth Amendment principles, that should guide the exercise of judgment by the lower courts in these fact-specific assessments.

These factors are derived from the basic functions counsel serves: He is a "guiding hand" to the accused through the legal process and a critical leg of the adversary process, a counterweight to the prosecutor. An attorney must, therefore, discharge certain basic responsibilities. He must: (1) function as an active advocate, providing "[u]ndivided allegiance and faithful, devoted service to a client." VonMoltke v. Gillies, 332 U.S. 708, 725 (1945); (2) act

as an informed advisor by providing the lawyer's skilled perspective on the case; and (3) conduct an adequate factual and legal investigation in order to be able to fulfill this advisory role in a proper manner.

The responsibility must be adequately discharged at sentencing as well as at trial. Particularly in the area of capital sentencing, effective counsel serves to ensure an individualized determination of life or death based on the character and background of the offender and the circumstances of the offense. Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983).

To prevail on a Sixth Amendment claim of ineffective assistance, a defendant must establish an adverse impact on the presentation of the case or other impairment to the defense from counsel's errors, not that the outcome would have been different with adequate counsel. The outcome-

determinative test is wholly inappropriate: It forces the federal courts to retry issues of guilt and penalty and to speculate on how the record might have been different and how these differences might have altered the perceptions of the original trier of fact. Instead of principled decisions focusing on an attorney's performance, the outcome-determinative test would generate a series of subjective judgments as to whether a person was properly convicted or sentenced. These would provide no guidance to conscientious counsel or reviewing courts.

In applying a standard of prejudice that focuses on the impairment to the defense, courts will necessarily be guided by certain factors: (1) the extent to which the defect in counsel's performance deprives the defendant of the essential attributes of counsel; (2) whether counsel's errors resulted in an improverish-

ment of the record; (3) the pervasiveness of counsel's derelictions; and (4) the nature and seriousness of the issues at stake.

The application of these principles to the present case demonstrates that the judgment below should be affirmed. Although the stakes were life or death, counsel failed to act as a zealous advocate, but rather ceased preparation for respondent's sentencing hearing out of a sense of hopelessness and despair. Because counsel had not conducted adequate investigation and preparation, he was in no position to provide the "guiding hand" that his client needed to make informed strategic choices. These derelictions fundamentally skewed the sentencing process because they deprived the sentencer of indispensable, individualized information about the accused, Zant v. Stephens, ___ U.S. ___, 103 S. Ct. 2733, 2743-44 (1983), that has

frequently been determinative in Florida capital sentencing decisions. Barclay v. Florida, ___ U.S. ___, 103 S. Ct. 3418 (1983).

III. The court of appeals correctly held that the state trial judge's testimony that the outcome would not have been affected should have been excluded at the habeas hearing. This testimony was irrelevant to the proper standard of prejudice under the Sixth Amendment. In addition, testimony about a judge's mental processes is inadmissible under Fayerweather v. Ritch, 195 U.S. 276 (1904) and its progeny. A contrary result would inevitably allow probing inquiries during federal habeas proceedings into the mental processes of judges and juries. Nor could the post hoc testimony of the state sentencing judge possibly comply with the requirement of reliability in capital sentencing.

ARGUMENT

I

THE COURT OF APPEALS WAS CORRECT IN MAKING AN INDEPENDENT DETERMINATION OF THE RESPONDENT'S CLAIM THAT HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT

Petitioners raise a threshold contention that the federal court should have accorded presumptive validity to the state court determination that the respondent was not deprived of the effective assistance of counsel. [Pet. Br. 84]. Petitioners are seriously mistaken in their view that the federal courts were bound by the state court findings.

First, the state court determination regarding counsel's effectiveness is not a presumptively correct finding of fact under 28 U.S.C. §2254(d). Section 2254(d) applies only to "basic, primary, or historical facts." Townsend v. Sain, 372 U.S. 293, 309 n. 6 (1963), (quoting Brown v. Allen, 344

U.S. 443, 506 (1953) (opinion of Frankfurter, J.)). In contrast, the issue of whether counsel's representation violated the Sixth Amendment involves "a legal standard, by definition normative and prescriptive, which must be applied to a particular set of facts." Walker v. Cardwell, 476 F.2d 213, 216 (5th Cir. 1973); Adams v. Jago, 703 F.2d 970, 978 (6th Cir. 1983). Thus, the resolution of whether a person has been denied the effective assistance of counsel is a mixed determination of law and fact that "is open to review on collateral attack in a federal court." Cuyler v. Sullivan, 446 U.S. 335, 342 (1980). Cf. Marshall v. Lonberger, ___ U.S. ___, 103 S.Ct. 843, 849 (1983); Brewer v. Williams, 430 U.S. 387, 403-04 (1977).

Second, it is well-settled that the federal courts have a clear, independent responsibility to decide such questions of

federal constitutional law,[17] without being bound by the state court's decision. Summer v. Mata, 455 U.S. 591, 597 (1982); Brown v. Allen, 344 U.S. 443, 458-59 (1953). See also, Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Consequently, the federal courts were correct in making an independent determination of the respondent's claim that he was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment.

17/ The conclusion to be drawn from the record in the present case regarding the effectiveness of counsel's representation is purely legal in nature and does not involve the resolution of any factual determinations or matters of credibility, since the state courts did not conduct any evidentiary hearing where facts were in conflict or credibility at issue. Compare, Maggio v. Fulford, ___ U.S. ___, 103 S.Ct. 2261, 2262 (1981). The absence of any development in the state court of the pertinent facts regarding counsel's actions outside of the courtroom also required the district court to conduct an evidentiary hearing pursuant to the mandate of Townsend v. Sain, 372 U.S. 293 (1963). See also, Machibroda v. United States, 368 U.S. 487, 494-95 (1962). Petitioners' argument that such a hearing was not necessary or appropriate [Pet. Br. 57, 62] is plainly without merit.

II

A CLAIM OF INEFFECTIVE ASSISTANCE IS MADE WHEN A DEFENDANT SHOWS: (1) THAT HE DID NOT RECEIVE REPRESENTATION WITHIN THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES AND (2) THAT COUNSEL'S FAILINGS IMPAIRED THE PRESENTATION OF HIS DEFENSE WITHOUT REGARD TO WHETHER THE OUTCOME WOULD NECESSARILY HAVE BEEN DIFFERENT

The en banc court of appeals reached the correct result on the merits. We do not, however, support all of the en banc court's reasoning. As suggested below, the en banc court's rigid, categorical approach to the issue of counsel's duty to investigate is neither necessary nor helpful, and creates further complications in an area that is already less than clear. In addition, the en banc court's standard of prejudice is less satisfactory than that followed by several circuits and adopted in substantial part by the panel. We therefore set forth the Sixth Amendment principles that we believe should govern this case. In the course of this presenta-

tion, we will encounter and dismiss at the threshold petitioners' arguments, which essentially ask the Court to eviscerate the Sixth Amendment and disincorporate its provisions from the Fourteenth Amendment.

A. The Sixth Amendment is Violated By Representation That Falls Outside The Range of Competence Demanded of Attorneys in Criminal Cases

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S Const. amend. VI.[18] The Court has frequently emphasized the "fundamental" nature of this constitutional provision, Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963), since "[t]he assistance of

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18/ This right is secured for defendants in state as well as in federal criminal proceedings. Gideon v. Wainwright, 372 U.S. 335 (1963). Gideon signalled a sharp departure from the Court's analysis of the right to counsel in state proceedings solely under the Fourteenth Amendment's Due Process Clause. Betts v. Brady, 316 U.S. 455 (1942).

counsel is often a requisite to the very existence of a fair trial." Argersinger v. Hamlin, 407 U.S. 25, 31 (1972). See, e.g., Cuyler v. Sullivan, 446 U.S. at 344; Johnson v. Zerbst, 304 U.S. 458, 462 (1938); Powell v. Alabama, 387 U.S. 45, 67 (1932).

The theme of the Court's Sixth Amendment decisions is that a lawyer is a precondition to a fair trial,[19] not simply one element of a fair trial. Cuyler, 446 U.S. at 443-44. Therefore, the petitioners are wrong in contending that the issue in this case is solely one of fundamental fairness under the Due Process Clause. [Pet. Br. 16].

Indeed, the petitioners are doing nothing less than inviting the Court to resurrect the analysis of Betts v. Brady, supra,

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19/ The fundamental nature of this constitutional guarantee is reflected in the Court's view that the assistance of counsel is one of the "rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 n. 8 (1967).

a decision repudiated in Gideon as "an anachronism when handed down." 372 U.S. at 345. Developments since Gideon firmly establish that vindication of the right to counsel is not dependent upon whether the proceeding is characterized as fundamentally unfair, compare United States v. Wade, 388 U.S. 218 (1967) (Sixth Amendment right to counsel) with Stovall v. Denno, 388 U.S. 293 (1967) (Due Process Clause), but on whether inadequate counsel violated the accused's Sixth Amendment rights.[20]

Furthermore, the reversion to Betts v.

20/ Smithburn and Springmann, Effective Assistance of Counsel: In Quest of A Uniform Standard of Review, 17 Wake Forest L. Rev. 497, 503 (1981); Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc), cert. denied, 446 U.S. 974 (1979). See also Moore v. United States, 432 F.2d 730, 737 (3rd Cir. 1970) (en banc). For these reasons, petitioners' reliance on a variety of cases decided under the Due Process Clause -- United States v. Agurs, 427 U.S. 97 (1976); Smith v. Phillips, 455 U.S. 209 (1982); Cupp v. McNaughten, 414 U.S. 141 (1973) -- is misplaced. [Pet. Br. 91-94].

Brady, would, as petitioners candidly concede, [Pet. Br. 77], thrust federal courts into the morass of the "farce and mockery" test, a quagmire the Court clearly sought to avoid in formulating an objective standard of effectiveness under the Sixth Amendment in McMann v. Richardson, 397 U.S. 759, 771 (1970). See also Tollett v. Henderson, 411 U.S. 258, 266 (1973).[21]

The Court's decisions on the scope of review in collateral proceedings of trial errors to which no contemporaneous objection was made, upon which petitioners rely heavily [Pet. Br. 71-75, 87-94], provide no support for their contention. See,

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21/ While many courts have followed the test in McMann, several state courts and the Second Circuit (see Appendix B), still adhere to the archaic "farce and mockery" approach derived from Betts. Comment, Defects In Ineffective Assistance Standard Used by State Courts, 50 U. Col. L. Rev. 389, 406 (1979). See also Comment, Effective Assistance of Counsel: A Constitutional Right in Transition, 10 Val. L. Rev. 509, 519 (1976).

e.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982), and United States v. Frady, 456 U. S. 152 (1982) [Pet. Br. 71-75; 87-90]. None of these cases involves a challenge to the adequacy of counsel.[22] To the contrary, all of the Court's procedural default cases assume the presence of competent counsel.[23] In these cases, the Court considered the circumstances under which courts on collateral

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22/ In Wainwright v. Sykes, the prisoner had waived any allegation relating to ineffective assistance of counsel at his trial. Id., 433 U.S. at 75 n. 4, and the Court did not address this issue. 433 U.S. at 88 n. 12.

23/ In Wainwright v. Sykes, both Justices Stevens and White assumed the presence of competent counsel. Id., 433 U.S. at 96 (Stevens, J., concurring) ("[C]ompetent trial counsel could well have made a deliberate decision not to object to the admission of the respondent's in-custody statement"); id., 433 U.S. at 99 (White, J., concurring) (deliberate bypass unless record demonstrates that services of counsel were not "within the McMann reasonable competence standard"). See also United States v. Davis, 411 U.S. 233, 234 n. 1 (1973); Fay v. Noia, 372 U.S. 391, 439 (1963).

review would assess the merits of federal constitutional claims even though there had been procedural defaults by competent counsel in state or federal trial courts. The rationale of these cases is obviously irrelevant to ineffectiveness claims[24] and contains no hint of the bold extension sought by petitioners.[25]

In short, the petitioners' proposed regression to Betts v. Brady and the "farce

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24/ Note, A Functional Analysis of the Effective Assistance of Counsel, 80 Colum. L. Rev. 1053, 1060 n. 53 (1980). If anything, the Court's observation in Engle v. Isaac that "the Constitution guarantees criminal defendants only a fair trial and a competent attorney," 456 U.S. at 134 (emphasis added) belies the petitioners' contention that that there is no distinct Sixth Amendment interest in the performance of counsel apart from whether a defendant received a fair trial.

25/ In fact, these decisions provide compelling reasons for ensuring representation by competent counsel, since federal constitutional rights could otherwise be forever waived through attorney error, neglect or indifference rather than as a consequence of the exercise of "reasonable professional judgment." Jones v. Barnes, ___ U.S. ___, 103 S.Ct. 3308, 3314 (1983).

and mockery" test is wholly at odds with the development of the Sixth Amendment guarantee in the Court.[26]

1. The Basic Functions of Counsel in Criminal Proceedings Have Been Conceived and Developed in The Right to Counsel Cases Decided By The Court Under The Sixth Amendment

The principal functions of counsel in the criminal process have been established by the Court in right to counsel cases. The repeated theme of these decisions is that counsel serves "as a guide through complex legal technicalities"

26/ One final assertion by petitioners need only be briefly mentioned. Respondent is not challenging the substantive propriety of his death sentence. [Pet. Br. 62-63]. Every court -- state and federal -- that has reviewed this case has recognized that the focus of respondent's claims is on deficiencies in the sentencing proceedings as a consequence of inadequate counsel. This is clearly a proper challenge to a death sentence in federal court: "[T]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." Gardner v. Florida, 430 U.S. 349, 358 (1977) (emphasis added). See also, Townsend v. Sain, 334 U.S. 728, 741 (1948).

for the lay person, United States v. Ash, 413 U.S. 300, 307 (1973), and as a counterweight in the adversary system to the creation of a professional prosecuting official. Id. at 309.

The "guiding hand of counsel" is imperative to assist the accused layperson in understanding the nature of his case. As Justice Sutherland recognized in Powell v. Alabama:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one."

See also Geders v. United States, 425 U.S. 80, 88 (1970); Tomkins v. State of Missouri,

323 U.S. 485, 489 (1945); Williams v. Kaiser, 323 U.S. 471, 475-76 (1945); Johnson v. Zerbst, 304 U.S. at 463.

Counsel enables the accused to assess the charges and potential defenses so that the defendant may intelligently understand the options available to him. Hamilton v. Alabama, 368 U.S. 52, 55 (1961). Counsel does so by applying a specialized ability to integrate a knowledge of the law with an assessment of the relevant facts to determine how the accused can best present his defense. Counsel also protects the accused against an erroneous or improper prosecution by vigorously examining witnesses, probing for evidence, developing facts, making legal arguments and generally requiring that the prosecution be put to its legal proof. Coleman v. Alabama, 399 U.S. 1, 9 (1970). To protect the accused adequately, "the guiding hand of counsel" must be available "at every step in the proceedings against

him." Powell v. Alabama, 287 U.S. at 69. See also Estelle v. Smith, 451 U.S. 454, 471 (1981); Coleman v. Alabama, 399 U.S. at 7; United States v. Wade, 388 U.S. at 224-226.

Consequently, counsel is not a supplement to other constitutional rights; he is an indispensable figure charged with ensuring that all other constitutional and procedural protections afforded the accused are fully preserved. The right to counsel is sui generis; "there is no right more essential than the right to assistance of counsel . . ." Lakeside v. Oregon, 453 U.S. 333, 341 (1978), because "it affects [an accused person's] ability to assert any other rights he might have." Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).

Besides performing an essential role for the accused, defense counsel's participation in the criminal process is criti-

cal to the integrity and fairness of the adversary system. Brewer v. Williams, 430 U.S. 387, 398 (1977); United States v. Morrison, 449 U.S. 361, 364 (1981). The adversary system assumes the presence and active involvement of three participants -- the judge, prosecutor and defense counsel -- who will discharge their respective responsibilities conscientiously and effectively.[27] United States v. Ash, 413 U.S. at 309. See also Johnson v. Zerbst, 304 U.S. at 462; Gideon v. Wainwright, 372 U.S. at 344. Partisan advocacy by defense counsel and the prosecutor

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27/ The Chief Justice has metaphorically compared the criminal justice system to a tripod with the court, the prosecutor and defense counsel as the legs. Inadequate legal representation for a criminal defendant severely impairs this system by effectively removing one of the legs. Proceedings At The 1969 Judicial Conference, United States Court of Appeals (Tenth Circuit), 49 F.R.D. 347, 359 (1969). See also ABA Project On Standards For Criminal Justice, Standard § 1 Relating to the Defense Function, 4-1.1(a) (2d. ed 1980).

serves to promote the fact-finding objectives that are necessary to proper determinations in the adversary system. Herring v. New York, 422 U.S. 853, 862 (1975). See also Polk County v. Dodson, 454 U.S. 312, 318 (1981); United States v. Nobles, 422 U.S. 225, 230 (1975).

In sum, the dual functions of counsel underscore the critical role of the effective assistance of counsel in the criminal process. As we show below, they also suggest the standards by which claims of ineffective assistance should be determined.

2. Effective Counsel Must Discharge Certain Basic Duties That Derive Directly From the Functions He Fulfills in the Criminal Process

At the outset, we note the parameters established by the decisions of the circuits and the implications of the Court's Sixth Amendment cases. On one hand, the basic purposes of the Sixth Amendment guarantee of counsel must require more

than the mere formal appointment or physical presence of counsel. See Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978); Avery v. Alabama, 308 U.S. 444, 446 (1940); White v. Ragen, 324 U.S. 760 (1945); Powell v. Alabama, supra.[28] On the other hand, the Constitution does not require errorless counsel, Parker v. North Carolina, 397 U.S. 790, 797 (1970); McMann v. Richardson, 397 U.S. at 771, nor does it compel counsel to recognize and raise every conceivable claim or defense. Engle v. Isaac, 456 U.S. at 134. "[C]ounsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers." Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980). Rather, counsel must provide assistance "within the range

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28/ Comment, Ineffective Representation As A Basis For Relief From Conviction: Principles For Appellate Review, 13 Colum. L.J. and Soc. Pr. 1, 7 (1977).

of competence demanded of attorneys in criminal case." McMann v. Richardson, 397 U.S. at 771.[29] Accord Tollett v. Henderson, 411 U.S. 258, 266 (1973). This encompasses the level of competency provided by attorneys with knowledge, skill, judgment and diligence in the sound practice of criminal law. See also Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (en banc).

Thus far, the Court has not fleshed out the details of that responsibility;

29/ In McMann, the Court did not describe the standard in any more detail, preferring to leave its development "to the good sense and discretion of the trial courts." Id. at 771. With the exception of the Second Circuit, which still adheres to a "farce and mockery" test, the courts of appeal have uniformly adopted an objective standard for assessing counsel's performance that is identical or similar to that announced in McMann. The standards in each circuit are set forth in Appendix B.

it has not formulated any list of specific duties for determining whether counsel has been reasonably competent. Nor in respondent's view would it be necessary or wise to do so. To implement an exhaustive list of categorial rules, as the en banc court attempted, would not provide sufficient guidance for the state and federal courts that must apply the Sixth Amendment guarantee in a wide variety of factual settings. The rules would of necessity be imprecise, and would divert the courts from the principal inquiry: whether the actions or inactions of counsel in a particular case were that which a reasonably competent lawyer, faced with similar circumstances, would have undertaken. See Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir. 1981). Rather, courts should retain the discretion to utilize a broad range of sources, including the American Bar Association (ABA) Model Rules of Professional

Conduct,[30] or the ABA Standards for Criminal Justice (2d. ed 1980),[31] prece-

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30/ See Jones v. Barnes, 103 S.Ct. at 3313 n. 6; Cuyler v. Sullivan, 446 U.S. at 346 n. 11.

31/ Although these standards do not define minimal constitutional criteria, Jones v. Barnes, 103 S.Ct. at 3313 n. 6, the Court has frequently noted their relevance in assessing the responsibilities of defense counsel under the Sixth Amendment. Id., 103 S.Ct. at 3312. Holloway v. Arkansas, 435 U.S. at 486 n. 9; Cuyler v. Sullivan, 446 U.S. at 346 n. 11. In contrast, some courts have adopted specific obligations for defense counsel, many of which are drawn from these standards. See, e.g., State v. Perez, 98 Idaho 181, 184, 579 P.2d 127, 129 (1975); State v. Hester, 45 Ohio St.2d 71, 79, 341 N.E. 2d 304, 310 (1976); Baxter v. Rose, 523 S.W. 2d 930, 936 (Tenn. 1975); State v. Harper, 57 Wis. 2d 543, 557, 205 N.W. 2d 1, 9 (1973); Marzullo v. State of Maryland, 561 F.2d 540, 544 (4th Cir. 1977).

Several commentators have urged the adoption of these or other precise criteria to measure counsel's performance under the Sixth Amendment. See, e.g., Levine, Toward Competent Counsel, 13 Rutgers L. Rev. 227 (1982); Erickson, Standards Of Competency For Defense Counsel In A Criminal Case, 17 Am. Crim. L. Rev. 233 (1980); Smithburn and Springmann, supra n. 20; Lasater, The Role of Harm in Effective Assistance of Counsel Cases: Procedure and Policy, 32 Syracuse L. Rev. 759 (1981).

dent from state and federal courts, expert testimony, and other information that could assist in the objective determination of the normal range of competency of attorneys in criminal cases.

What the Court's precedents do indicate, however, is that the Sixth Amendment guarantee requires counsel to discharge certain basic responsibilities in every criminal proceeding. It is against these responsibilities that counsel's competence and effectiveness must be measured.

First, as the Solicitor General concedes [S.B. 13], counsel must give "[u]ndivided allegiance and faithful, devoted service to a client." VonMoltke v. Gillies, 332 U.S. 708, 725 (1945) (plurality opinion). See also Ferri v. Ackermann, 444 U.S. 193, 204 (1979); Cuyler v. Sullivan, supra; Holloway v. Arkansas, supra. While there is no guarantee of a "'meaningful relationship' between an accused and

his counsel," Morris v. Slappy, ___ U.S. ___, 103 S.Ct. 1610, 1617 (1983), the Sixth Amendment still requires an attorney to pursue the defense as "an active advocate in behalf of his client." Anders v. California, 386 U.S. 738, 744 (1967). See also Entsminger v. Iowa, 386 U.S. 748, 75 (1967). Therefore, responsible, competent counsel must be an advocate, devoted to serving his client's interests vigorously in an adversary proceeding.[32]

32/ Commentators have recognized the threat to the adversary system posed by ineffective defense counsel. See, e.g., Note, Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. DeCoster, 93 Harv. L. Rev. 752, 767 (1980); Schwarzer, Dealing With Incompetent Counsel: The Trial Judge's Role, 93 Harv. L. Rev. 633, 637 (1980) (Adversary process ceases to function when lawyers are not competent); Comment, A Standard For The Effective Assistance of Counsel, 14 Wake Forest L. Rev. 175, 193 (1978); Comment, Effective Assistance of Counsel: A Constitutional Right In Transition, 10 Val. L. Rev. 509, 528-29 (1976); Finer, Ineffective Assistance of Counsel, 58 Cornell L. Rev. 1077, 1116 (1973).

Second, counsel must bring an informed grasp of the facts and law to his decision-making on the wide range of issues confronting the accused. The "reasonably competent advice" demanded of counsel by McMann v. Richardson,[33] 397 U.S. at 770, is the keystone of effective assistance, "lest the accused concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which [he] in fact and in law committed." Tompkins v. State of Missouri, 323 U.S. at 489. The accused is effectively deprived

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33/ Petitioners miss the point of McMann in suggesting that the obligations of counsel set forth in that decision are limited to guilty plea cases. [Pet. Br. 78-79; 82-83]. The decision is not limited by its terms to guilty plea cases nor is there any sound constitutional or logical reason for assessing counsel's adequacy under a different standard when the defendant goes to trial. The teaching of McMann is that reasonably competent advice is a precondition to the "guiding hand" role of counsel at all stages of the criminal process.

of the "guiding hand" of counsel unless counsel provides the defendant with advice predicated on a basic understanding of the application of the law to the relevant facts.

Third, it necessarily follows from counsel's role as advisor and "guiding hand" that an attorney "must make an independent examination of the facts, circumstances, pleadings and laws involved" in order to be in the position to exercise sound professional judgment for the accused. Van Moltke v. Gillies, 322 U.S. at 721; Powell v. Alabama, 287 U.S. at 57. See also Brewer v. Williams, 430 U.S. 387, 398 (1977); Tollett v. Henderson, 411 U.S. at 266-67. The consensus of the circuits on this point is well-expressed in Moore v. United States, 472 F.2d at 735:

> The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues

> and tactics at trial which would otherwise not emerge.[34]

Without preparation to unearth the factual bases of the case, counsel cannot "act as a spokesman for, or advisor to, the accused," United States v. Ash, 413 U.S. at 312 or "protect [him] from conviction resulting from his own ignorance of his legal and constitutional rights." Johnson v. Zerbst, 304 U.S. at 465. Gaines v. Hopper, 575 F.2d 1147, 1149-50 (5th Cir. 1978). Without adequate investigation, counsel is

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34/ Moore and numerous other decisions in the circuits explicitly state what McMann strongly intimates -- the Sixth Amendment guarantee requires an attorney to obtain "the legal and factual information he needs to appreciate the decisions he must make." Tague, The Attempt To Improve Criminal Defense Representation, 15 Am. Crim. L. Rev. 109, 116-17 (1977). See, e.g., Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1798 (1983); Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978); Wolfs v. Britton, 509 F.2d 304, 309 (8th Cir. 1975); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). See also Schwarzer, supra, note 31, at 654 (Adequate preparation lies at the heart of a competent trial performance).

little more than a companion for the hapless layperson as he wanders through the intricacies of a criminal trial to a foreordained result.[35]

For these reasons, the assumption of the en banc court that, in certain instances, counsel can make a reasonable choice among alternative strategies without conducting an adequate investigation is inconsistent with

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35/ As the Fifth Circuit aptly observed:

> [A]ny experienced trial lawyer knows that a purported trial without adequate preparation amounts to no trial at all. Brooks v. Texas, 381 F.2d 619, 625 (5th Cir. 1967).

See also McQueen v. Swenson, 493 F.2d 207, 215-16 (8th Cir. 1974).

The adequacy of counsel's investigation in particular circumstances must turn on the specific facts of the case and does not lend itself to the categorical rules that the en banc court of appeals sought to formulate. The scope of investigation will vary according to the nature of the prosecution's case, the seriousness of the charges, the complexity of the issues and the extent of the colorable defenses to the charges. Washington v. Watkins, 655 F.2d at 1356; United States v. Tucker, 716 F.2d 576, 584 (9th Cir. 1983).

Sixth Amendment principles. [Pet. App. 53-54]. This assumption is squarely at odds with Powell v. Alabama, 287 U.S. at 58, and Von Moltke v. Gilles, 322 U.S. at 721, both of which indicate that a reasonable investigation is the prerequisite to an informed tactical decision. "Strategic" decisions of an attorney without reasonable investigation and preparation of the pertinent facts and law amount to nothing more than uninformed speculation.[36]

A court cannot, and should not, conjure up a meaningful tactical judgment or strategic choice by a lawyer who is too factu-

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36/ See ABA Project on Standards for Criminal Justice, Standards Relating to the Defense Function 4-4.1(2d ed. 1980) (Duty To Investigate); Note, Effective Assistance of Counsel For The Indigent Defendant, 78 Harv. L. Rev. 1434, 1439 (1965) (Competent decision to omit a possible defense assumes adequate knowledge of the potential of the defense, which usually depends upon investigation); Schwarzer, supra, note 31, at page 656 (Only after an adequate investigation of leads for clearly indicated defenses can counsel advise his client properly and make the required tactical decisions).

ally uninformed to make a competent decision. Nor should a habeas petitioner have to negate the possibility that a demonstrable failure to conduct an adequate investigation into the relevant law or facts was a strategic or tactical decision. "[T]he crucial inquiry is not whether appellate judges can imagine an argument to justify counsel's decision, but whether the record indicates that the attorney was aware of the problem, considered the alternatives, and made a reasonable choice of the best course of action."[37] If he did not, then the failure to investigate and prepare can only be attributable to neglect or ignorance of the accused's interests, and the defendant has been effectively deprived of the assistance of counsel guaranteed by the Sixth

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37/ Comment, Ineffective Representation As A Basis for Relief From Conviction: Principles for Appellate Review, 13 Colum. L. Rev. and Soc. Pr. 1, 20 (1977).

Amendment.[38] Pickens v. Lockhart, 714 F.2d 1455, 1467 (8th Cir. 1983).

3. Adequate Performance Of The Basic Duties of Reasonably Competent Counsel Is Critical To The Reliability Of Capital Sentencing Determinations

The basic duties of reasonably competent counsel described above must be discharged at sentencing as well as at trial. Gardner v. Florida, 430 U.S. 349, 358 (1977). Because of the critical nature of the sentencing determination, counsel's

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38/ The relative wisdom of counsel's decisions after adequate investigation need not be open to review under this standard; the only pertinent inquiry is whether defense counsel had a tactical or strategic justification that "reasonably competent, fairly experienced attorneys might agree with or find reasonably debatable." Finer, supra, note 31, at 1080. See also Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). The production of this evidence would place a minimal burden on the State, since the trial counsel "may be unwilling to cooperate with present counsel" and is "much more likely to cooperate and consult with counsel for the State, whose object at the hearing will be to vindicate his conduct." Stanley v. Zant, 697 F.2d 955, 974 (5th Cir. 1983) (Arnold, J., dissenting).

assistance is essential "in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence." Mempa v. Rhay, 389 U.S. 128, 135 (1967). Accord Gardner, 430 U.S. at 360; Moore v. Michigan, 355 U.S. at 155, 160 (1957).[39] Effective assistance must include zealous advocacy and an informed grasp of the law and facts pertinent to the sentencing issues, based n an adequate investigation. Cf. Von Moltke v. Gillies, 332 U.S. at 721.[40]

39/ See also United States v. Pinkney, 543 F.2d 908, 914 (D.C. Cir. 1976); Mason v. Balkcom, 531 F.2d 717, 723 (5th Cir. 1976); ABA Project on Standards For Criminal Justice, Standards Relating To The Defense Function, 4-7.10 (Post-trial motions); 4-8.1 (Sentencing) (2d Ed. 1980).

40/ The drafters of the ABA Standards have similarly emphasized the critical need for counsel to conduct an independent investigation for sentencing:

The lawyer also has a substantial

(footnote continues on following page)

Adequate performance of these basic functions is nowhere more crucial than in

40/ continued

> and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions." Id. at 4-55.

Other commentators repeatedly stress the need for careful investigation of mitigating information for a sentencing hearing. See, e.g., Dash, The Defense Lawyer's Role At The Sentencing Stage of A Criminal Case, 54 F.R.D. 315, 316 (1972) (In order to provide effective assistance to his client, the lawyer must be prepared to present to the court the most favorable facts relating to his client's life history, employment record and, where appropriate, his potential and prospects for rehabilitation). See also Comment, Adequacy of a Criminal Defense Lawyer's Preparation For Sentencing, 1981 Ariz. St. L. J. 585, 608 (Investigation should encompass interviews with the client and with those who know him best, a diligent search for mitigating information and inquiry into available programs for rehabilitation).

capital sentencing proceedings, where vigorous advocacy and investigation are indispensable to the proper fulfillment of the central purpose of a valid capital sentencing scheme -- the individualized determination of life or death on the basis of the character and background of the individual and the circumstances of the particular offense. Zant v. Stephens, ___ U.S. ___, 102 S.Ct. 2733, 2744 (1983); accord California v. Ramos, ___ U.S. ___, 103 S.Ct. 3446, 3452-3453 (1983); Barclay v. Florida, ___ U.S. ___, 103 S. Ct. 3418, 3423 (plurality opinion); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Woodson v. North Carolina, 428 U.S. 220, 304 (1976).[41] To ensure that informed decisions are made as to whether a person should live or die, it is essential that the sentencer "have before it all pos-

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41/ See generally Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev. 299, 323-25 (1983).

sible relevant information about the individual defendant whose fate it must determine". Jurek v. Texas, 428 U.S. 273, 276 (1976).[42]

Counsel is certainly in no position to assist the defendant or the sentencer in understanding the unique issues at stake in a capital sentencing hearing unless there has been an adequate investigation into potential mitigating information about the client's individual circumstances and background.[43] Only after an investigation of all available mitigating circumstances can counsel make an informed decision about what

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42/ Goodpaster, supra note 41, at 319:

> Where potentially beneficial mitigating evidence exists and counsel has not presented it, counsel has precluded the sentencer from considering mitigating factors. Through failure to discover or present such evidence, counsel has "create[d] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. (quoting from Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

43/ Goodpaster, supra note 42, at 344.

evidence should be presented to make a convincing case for sparing the defendant's life. Pickens v. Lockhart, 714 F.2d at 1467.

B. Relief Should Be Granted To A Defendant Who Demonstrates That Counsel's Serious Derelictions Impaired The Presentation Of The Defense, Though Not Necessarily The Outcome of the Trial

In requiring a showing of prejudice but rejecting the outcome-determinative test of DeCoster III, the en banc court acted in a manner consistent with the Sixth Amendment principles discussed above. While the Court has not yet addressed the prejudice question in this context,[44] it has indicated that

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44/ Petitioners rely on Chambers v. Maroney, 399 U.S. 42, 53-54 (1970) to support a requirement that the defendant show an effect on the outcome of the proceeding [Pet. Br. at 93]. However, the Court did not squarely confront the issue in that case. At that time, the Third Circuit rule was "that the belated appointment of counsel is inherently prejudicial and makes out a prima facie case of denial of effective counsel, with the burden of proving absence of prejudice shifted to the prosecuting

(footnote continued on following page)

only those violations that have "had [an] adverse impact upon the criminal proceedings" warrant relief under the Sixth Amendment. United States v. Morrison, 449 U.S. 361, 367 (1981); cf. Avery v. Alabama, 308 U.S. at 452.[45] The en banc court erred, however, in adopting the "actual and substantial pre-

44/ continued

authorities." United States ex rel. Chambers v. Maroney, 408 F.2d 1186, 1189-90 (3d Cir. 1969). Consistent with this analysis, the court of appeals determined that the presumption of prejudice was sufficiently rebutted by the State, id. at 1195, a determination that was affirmed by this Court. Therefore, it defies reason for petitioners to suggest [Pet. Br. 93] that Chambers tacitly determined the degree of prejudice in ineffective assistance cases in a manner at odds with the court of appeals decision that this Court affirmed. Indeed, Chambers has been interpreted as standing solely for the proposition that the late appointment of counsel is not per se prejudicial. See, e.g., Cooper v. Fitzharris, 586 F.2d at 1331.

45/ With the exception of the Fourth and Sixth Circuits, every court of appeals requires the petitioner to bear the burden of showing some impairment to the presentation of the defense resulting from counsel's errors. (Appendix C). A substantial number of state jurisdictions require a defendant to demonstrate prejudice. Erickson, supra, note 32, 17 Am Cr. L. Rev. at 249 n. 137.

judice" formulation of United States v. Frady, 456 U.S. at 170, because this standard is foreign to -- indeed, in conflict with -- basic Sixth Amendment principles.

1. Relief Should Be Granted To A Habeas Petitioner Who Demonstrates That Counsel's Serious Derelictions Impaired The Presentation Of His Defense, Though Not Necesarily The Outcome Of His Trial

Virtually without exception, the circuits' decisions support the adoption of a standard of prejudice that focuses on whether counsel's derelictions had an adverse impact on the presentation of the defense, and the rejection of a test that inquires into whether the result would have been altered in the absence of inadequate counsel.[46]

46/ It is noteworthy that most commentators, while differing over the proper methodology for analyzing claims of ineffective counsel, reject the outcome-determinative test as inconsistent with Sixth Amendment principles. See, e.g., Note, A New Focus On Prejudice In Ineffective Assistance of Counsel Cases: The Assertion Of Rights Standard, 21 Am.

(footnote continues on following page)

Respondent will first explore why an outcome-determinative test is unacceptable and will then explain why a standard of prejudice that focuses on impairment to the defense is more closely attuned to basic Sixth Amendment principles.

46/ continued

Crim. L. Rev. 29 (1983) (proposing an assertion of rights standard that requires counsel to assert adequately all pertinent rights of the defendant); Comment, A Coherent Approach To Ineffective Assistance of Counsel Claims, 71 Cal. L. Rev. 1516 (1983) (proposing a "net diminution" analysis which measures prejudice by whether there has been a net diminution in the quality of the attorney's performance); Smithburn and Springmann, supra, 17 Wake Forest L. Rev. 497 (proposing the development of uniform guidelines for assessing ineffective assistance of counsel claims); Lasater, The Role of Harm In Ineffective Assistance of Counsel Cases: Procedure and Policy, 32 Syracuse L. Rev. 759 (1981) (proposing the development of an objective set of guidelines describing in detail the duties owed by defense counsel); Erickson, supra n.30, 17 Amer. Crim. L. Rev. at 250 n.143; Finer, supra n.31, 58 Cornell L. Rev. 1104, 1105 n.160 and accompanying text; Note, A Functional Analysis of the Effective Assistance of Counsel, 80 Colum. L. Rev. 1053 (1980) (evaluates ineffective representation in terms of the potential of substantial prejudice to the various interests protected by the right to counsel).

a. The court of appeals correctly rejected an outcome-determinative standard of prejudice

The court of appeals properly concluded that an outcome-determinative test places an untoward burden on a habeas petitioner. [Pet. App. 70-73]. This test also imposes a host of inapropriate and burdensome responsibilities on the federal courts and is inconsistent with the fundamental values underlying the Sixth Amendment.

First, it is evident that a focus on outcome will require federal courts to retry issues of guilt and penalty, inevitably forcing judges to trespass "upon what properly would have been the jury's province in weighing the truth or falsity of the evidence at the original trial." McQueen v. Swenson, 498 F.2d at 220. This inquiry therefore risks substituting the judgment of federal courts on the evidence and its weight or bearing on guilt and sentence for that of a properly informed state trial

judge or jury. Field, Assessing the Harmlessness of Federal Constitutional Error -- A Process In Need Of A Rationale, 125 U. Pa. L. Rev. 15, 33-34 (1976); Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988 1020 (1973); R. Traynor, The Riddle of Harmless Error, 18, 29 (1970).

Second, such an inquiry is not only improper, but also highly speculative. A federal judge must necessarily conjecture about how a judge or jury might have reacted to certain evidence or testimony. United States v. Tucker, 716 F.2d at 589. Cf. Traynor, supra, at page 23. While a trial court or jury before whom the witnesses appear is in a position to evaluate the numerous factors that affect the probative value of testimony, a court reviewing the cold, written record has no way of doing so. Traynor, supra, at page 30.

This speculation reaches particularly unacceptable levels when counsel's failings

have resulted in an impoverished record. When counsel has failed to investigate and prepare, it is unfair if not impossible to assess the impact that later unearthed information, first presented in habeas corpus hearings, would have had on the decision maker in the original proceedings. Cf. Holloway v. Arkansas, 435 U.S. at 590-91; Schwarzer, supra n. 31, 93 Harv. L. Rev. at 642-43.

A reviewing court simply cannot reconstruct a criminal trial from portions of different records and determine with any degree of confidence how that hybrid proceeding would have been viewed by the first trier of fact. The reviewing court has seen only some witnesses, while the original trier has seen others. No one is in a position to resolve credibility conflicts or inconsistencies between these records. Moreover, the weight, value, and impact of particular evidence

or testimony is colored and shaped by the context and manner of its presentation. Not only might a previously elicited fact have looked different to the original trier in light of the new evidence, but also the reviewing court cannot ascertain how the full record would have been perceived had it been developed and structured by competent, effective counsel. Cf. Moore v. United States, 432 F.2d at 735.

To admit that a conviction or sentence was the result of a breakdown in the process, but then to make relief turn upon a guess as to how that process might have functioned with effective counsel is to trivialize the central importance of the guarantee of adequate counsel to the proper functioning of the adversary process.

Third, the subjective and conjectural inquiries implicit in decisions based on the outcome-determinative test will necessarily prevent any principled consistency in

determinations of effective assistance and will fail to provide sufficient guidance to conscientious counsel or reviewing courts. The unguided guesses of a district judge about what a state-court decision maker would have done if different evidence had been considered is hardly likely to be much illuminated or regulated by an array of particularistic opinions of appellate judges engaging in the same kind of guesswork. Cf. Field, supra, 125 U. Pa. L. Rev. at 36. This entire process does not approach the kind of "intelligent evenhanded application," Holloway v. Arkansas, 435 U.S. at 491, that is so essential for the elucidation of proper standards of attorney performance under the Sixth Amendment.

Fourth, an outcome-determinative test is unduly burdensome on the federal courts. In order accurately to assess the effect of counsel's failings on the outcome, a federal judge must evaluate the relative credibility

of various witnesses (which cannot be done without observing their demeanor), and consider the strength of the physical or documentary evidence (which cannot be done without examining it in full). An outcome-determinative test would compel the parties to present the case anew, without counsel's errors or omissions, in order to ensure a reliable decision as to what the proper outcome ought to be but for counsel's ineffectiveness. The burden on the federal courts would be inordinate.

The outcome-determinative standard is particularly inappropriate when claims of ineffective representation at capital sentencing proceedings are involved. Not only does a focus on result fail to ensure adequate protection of the defendant's legitimate interest in the character of a capital sentencing scheme, Gardner v. Florida, 430 U.S. at 358, but also it does not take into account the discretionary and highly sensi-

tive nature of the capital sentencing decision. Whereas one judge or juror may consider the defendant's character and background insufficient to mitigate a murder, another judge or juror could easily come to the opposite conclusion. Sentencing always involves "a large area of discretion and doubts." Carter v. Illinois, 392 U.S. 173, 178 (1946); United States v. Grayson, 438 U.S. 41, 48 (1978). Even under the guidelines provided by constitutional capital punishment statutes, there is the opportunity for a considerable amount of discretion informed by a wide variety of factors, both statutory and nonstatutory. Indeed, just last Term, the Court emphasized that the capital sentencing process is not "a rigid and mechanical parsing of statutory . . . factors," but that "[i]t is entirely fitting for the moral, factual, and legal judgment of judges and jurors to play a meaningful role in sentencing." Barclay v. Florida,

103 S.Ct at 3424; id. at 3435 (Stevens, J., concurring). The outcome-determinative standard will require the federal courts to engage in fine-spun speculation on how a sentencer would exercise that judgment when faced with new information in mitigation that inadequate counsel failed to uncover.

Furthermore, the application of an outcome-oriented test to capital sentencing proceedings will impose substantial burdens upon the federal courts. In order to meet the exacting requirements of reliability in the determination that death is the appropriate punishment in a particular case, Woodson v. North Carolina, 428 U.S. at 305, it is even more vital that the subtle influence and effects of live testimony be assessed, for these are the precise factors that often sway a sentencer to choose life over death. The habeas court could not rely on affidavits or depositions, for it would face the risk of basing conclusions about the merits

of a death sentence on a paper record. The sentencing hearing would have to be reconstructed -- together with the additional, originally-neglected evi.ence in mitigation -- in order to satisfy the district judge that the result would not have been different with adequate counsel.

Assuming that a record could somehow be satisfactorily recreated, the outcome-determinative standard would then require the federal district court to make substantive decisions on state capital sentencing issues. Under Florida law, the federal judge would have to engage in the weighing of aggravating and mitigating circumstances, a responsibility conferred by statute on state juries and judges. Fla. Stat. Ann. §921.141 3(b). This is hardly the sort of task that should be performed by a federal judge who would, of necessity, have to familiarize himself with the guidelines and interpretative nuances of state judicial

decisions on capital sentencing.

By forcing habeas courts to grapple with these substantive state sentencing concerns, the outcome-determinative test introduces other significant problems. For example, the district court below reached its own conclusion that respondent's proffered "character and medical testimony cannot reasonably be characterized as evidence of mental or emotional disturbance." [Pet. App. 286]. This conclusion is not supported by any findings that would explain it, nor is there any citation or reference to any Florida law that might have guided the district court in reaching that conclusion.[47] In the context of capital sentencing, the outcome-determinative test would convert habeas review into a standard-

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47/ We will explain below that Florida courts have frequently found that nonstatutory factors about a defendant's mental state or background provide a basis for imposing a life rather than a death sentence [see note 61, infra].

less rehashing of the propriety of the death sentence in a particular case, inevitably leading to the arbitrary results condemned in Furman v. Georgia, 408 U.S. 238 (1972).

For these reasons, virtually every circuit that has adopted a test of prejudice within the framework of a reasonable competence standard has focused the inquiry solely on the impact of counsel's inadequacy upon the course of the proceedings rather than upon the conjectured outcome. Under this view, a requirement of prejudice "does not mean" that the reviewing court must weigh the evidence for itself and conclude that "the defendant would have been acquitted but for counsel's blunders." Cooper v. Fitzharris, 586 F.2d at 1333; Harris v. Housewright, 697 F.2d 202, 212 (8th Cir. 1982); United States ex rel. Green v. Rundle, 434 F.2d 1115-1116 (3rd Cir. 1970). It means instead that the court must determine whether the ineffective assistance had an

adverse impact on or created a "flaw in the adversary process," McQueen v. Swensen, 498 F.2d at 218-19.[48] So far as the federal

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48/ Two circuits (the Fourth and Seventh) place a "harmless beyond a reasonable doubt" burden on the State. Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978); Wade v. Franzen, 678 F.2d 58, 59 (7th Cir. 1982). Two circuits (the Third and Eighth) hold that the accused must first demonstrate that, but for counsel's ineffectiveness, the proceedings before the trier of fact would have been materially different in a way "helpful" or "beneficial" to the accused; once the accused makes this showing, the burden shifts to the State to show that counsel's ineffectiveness was harmless beyond a reasonable doubt. United States v. Baynes, 687 F.2d 659, 673 (3d Cir. 1982), and United States ex rel. Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970); Reynolds v. Mabry, 574 F.2d 978, 980 (8th Cir. 1978) (citing McQueen v. Swensen, 498 F.2d at 220). Three circuits (the Fifth, Ninth and Eleventh) have adopted a standard that requires the accused to demonstrate that counsel's errors and omissions impaired the defense in some fashion. Washington v. Strickland (5th); United States v. Tucker, 716 F.2d at 588 (9th); Adams v. Strickland, 709 F.2d 1443, 1446 (11th Cir. 1983). The Sixth Circuit does not require a showing of prejudice, so there has been no need to formulate a standard. The First and Tenth Circuits have not expressed any opinion on the degree of prejudice that must be shown by a petitioner. See, e.g., United States v. Campa, 679 F.2d

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circuits are concerned, therefore, the outcome oriented standard of prejudice advocated by petitioners and amici curiae is an anomaly articulated in only two circuits -- the Second Circuit, which adheres to the universally condemned "farce and mockery" standard, and the District of Columbia Circuit, which wholly misinterpreted the source of its test.[49]

48/ continued

1006, 1009 (1st Cir. 1982); United States v. Glick, 710 F.2d 639, 644 n.6 (10th Cir. 1983).

49/ In developing its standard, the plurality opinion in Decoster relied extensively on a passage from Commonwealth v. Safarien, 386 Mass. 89, 96, 315 N.E. 2d 878, 883 (1974), which requires a showing that counsel's deficiency "has likely deprived the defendant of an otherwise available, substantial ground of defense." (emphasis added). It is evident that this is a process-oriented test. The Supreme Judicial Court of Massachusetts explicitly relied on process-oriented federal cases; it formulated a test of prejudice that required the defendant to demonstrate impairment to the defense; and the court specifically disavowed any inquiry that would exclusively concentrate on whether the trial was fair or

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Finally, the Court's decisions in the Sixth Amendment area are plainly at odds with an outcome-determinative standard. No decision of the Court involving the Sixth Amendment right to counsel has ever intimated that outcome, as opposed to the effect on the defense, is the appropriate focus of inquiry. See, e.g., Cuyler v. Sullivan, 446 U.S. at 348-49; Holloway v. Arkansas, 435 U.S. at 489-91; Avery v. Alabama, 308 U.S. at 458 (claim of inadequate investigation rejected in part because there was an "absence of any indication, on the motion and hearing for new trial, that [the attorneys] would have done more had additional time been granted."); White v. Ragen, 324 U. S.

49/ continued

guilt was established. Id. at 884. The outcome-oriented test in Decoster therefore bears little relationship to its process-oriented seed.

760, 764 (1975).[50] And a recent decision of the Court that canvasses the issue of prejudice in the Sixth Amendment context framed the inquiry solely in terms of whether the infringement "has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense." United States v. Morrison, 449 U.S. at 365. (emphasis added). The inquiry was conspicuously not whether the result of a criminal prosecution would have been different if the right to counsel had been properly afforded. See also Weatherford v. Bursey, 429 U.S. 545, 558 (1977).

It is not surprising therefore that

50/ The assertion that Chambers v. Maroney or McMann v. Richardson tacitly adopted this standard [Pet. Br. 83, 93; S.G. 14 n. 4] is simply unsupported by any fair reading of those decisions. See n. 44, supra. In fact, invitations to include considerations of outcome in Sixth Amendment analysis have been explicitly rejected by the Court. United States v. Tucker, 404 U.S. 443, 447 n. 5 (1972); Townsend v. Burke, 333 U.S. at 741.

respondent and amici curiae seek precedential support for an outcome-determinative test in non-Sixth Amendment decisions -- most notably in cases interpreting the Due Process Clauses of the Fifth and Fourteenth Amendments, e.g., United States v. Agurs, 427 U.S. 97 (1976), and those discussing the consequences of procedural defaults in trial courts.[51]

51/ Petitioners and amici curiae also rely on the recent decision in United States v. Valenzuela-Bernal, ___ U.S. ___, 102 S.Ct. 3440 (1982), for a result-oriented standard. This decision is inapposite for several reasons. First, the materiality standard established in Valenzuela-Bernal does not even extend beyond the unique circumstances in that case, which involved the tension between the executive's authority over immigration and the Compulsory Process Clause; the Court expressly reserved opinion on "the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance of his criminal trial witnesses within the United States." 102 S.Ct. at 3450 n. 9. Second, the Court "borrowed much of [its] reasoning [on prejudice] . . . from cases involving the Due Process Clause of the Fifth Amendment," id. at 3449. To this extent, reliance on Valenzuela-Bernal for an outcome-determina-

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However, as respondent has already explained, the Sixth Amendment orientation focus is very different from the due process concern with outcome.[52] The Sixth Amendment precludes the states from conducting trials at which "persons who face incarceration must defend themselves without adequate legal assistance." Cuyler v. Sullivan, supra, 446 U.S. at 744. Invocation of due process principles represents an unacceptable effort by petitioner and amici curiae to circumvent this guarantee and resurrect the "farce and mockery"

51/ continued

tive test is no more justifiable than seeking support from the due process line of authority discussed in the text.

52/ The petitioners' and Solicitor General's heavy reliance on United States v. Agurs, as a source of the principles to apply in Sixth Amendment cases is curious, since the Court in Agurs predicated its analysis on the presence of adequate counsel. 427 U.S. at 102 n.5.

progeny of Betts v. Brady.[53]

Finally, by extrapolating a standard of prejudice from Wainwright v. Sykes, Frady and Engle, the petitioners and amici curiae seek to fit a square peg in a round hole.[54]

53/ Erickson, 17 Am. Crim. L. Rev. 250 n. 143. The suggestion by the petitioners [Pet. Br. 74 n. 18] and the Solicitor General [S.G. 27-8] that Sixth Amendment analysis should be influenced by concern for the attorney's thought processes is equally unsettling and turns the guarantee of effective counsel on its head. The Sixth Amendment embodies a protection for the accused, not a comunications privilege for the attorney or a shield to insulate from inquiry counsel's decisions on behalf of the accused when they are challenged by the defendant. Nothing would be more disruptive of Sixth Amendment values than to elevate counsel from an advisor to the accused to an independent functionary whose decisions, however incompetent, are unassailable. Indeed, the "ardor of defense counsel" that petitioners and the Solicitor General seek will be enhanced, not vitiated, by articulated decisions on what constitutes adequate performance. In any event, the Court has already recognized that some degree of judicial supervision over the performance of attorneys is essential, so that "defendants cannot be left to the mercies of incompetent counsel," McMann v. Richardson, 397 U.S. at 771.

54/ For this reason, we also cannot sup-

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As noted earlier, these cases all assume the presence of competent counsel for the defendant. Once the defendant has had "a fair trial and a competent attorney," Engle v. Isaac, 456 U.S. at 134, (emphasis added) the interests in finality and comity dictate stringent rules to prevent "sandbagging" by competent defense lawyers who decide to forego objections in the state forum with the intention of raising their constitutional claims later in a federal habeas court if their client is convicted. Wainwright v. Sykes, 433 U.S. at 89.

By imposing cause and prejudice requirements on persons who failed to make a contemporaneous objection in state court, the Court has made "the state trial on the merits 'the main event' so to speak, rather than a 'tryout on the road' for what will

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54/ continued

port the reasoning of the en banc court, which derived its standard of prejudice in part from United States v. Frady.

later be the determinative federal habeas hearing." 433 U.S. at 90. However, while the Constitution does not require that the main event be a "game in which the participants are expected to enter the ring with a near match of skills, neither is it a sacrifice of unarmed prisoners to gladiators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1974).

While it is justifiable to erect a rigorous standard of prejudice when there has been a procedural default by competent counsel, United States v. Frady, 456 U.S. at 169-70, principles of finality developed in habeas jurisprudence should not shield criminal proceedings flawed by inadequate counsel from scrutiny under the Sixth Amendment.[55] Consequently, the outcome-

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55/ The court of appeal's concern that a different standard of prejudice would enable

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determinative principles advanced by the petitioners and amici curiae and the Frady standard are foreign to, and inconsistent with, the Sixth Amendment guarantee of adequate counsel.[56]

55/ continued

defendants to circumvent the procedural default cases is unwarranted. [Pet. App. 68 n. 30]. A habeas petitioner claiming inadequate assistance could not obtain review of an unobjected to error; the error would only serve as circumstantial evidence of an inadequate performance by counsel. If the petitioner were able to demonstrate serious derelictions and prejudice under the Sixth Amendment, the relief would be based on counsel's ineffectiveness, not on the merits of the defaulted claim. Therefore, the principles of Wainwright v. Sykes and its progeny, which preclude review of the merits of procedurally defaulted claims, could be fully preserved under a Sixth Amendment standard that is developed independently of the principles set forth in Frady.

56/ The Solicitor General suggests that the Sixth Amendment guarantee should be treated no differently than a new trial motion. [S.G. 18-26]. Historically, however, a new trial motion was "designed to afford relief where despite the fair conduct of the trial, it later clearly appears to the trial judge that because of facts unknown at the time of

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In sum, an outcome-determinative test of prejudice is fundamentally at odds with the Court's decisions and the standards developed in the overwhelming majority of the circuits. It is difficult to justify either logically or constitutionally; its exclusive focus on the result of, and not the adequacy of, counsel's performance, threatens to deprive the defendant of everything that makes counsel worthwhile in our adversary system. Additionally, the direction it signals is plainly wrong under the Sixth Amendment -- by permitting the nature

56/ continued

trial, substantial justice was not done." United States v. Johnson, 327 U.S. 106, 112 (1946). See also 8A Moore's Federal Practice ¶33.03[1] (2d ed. 1983). Obviously, after a fair trial with competent counsel, every piece of newly discovered evidence should not necessarily call into question the integrity of the verdict. The focus is therefore quite properly on whether the result would have been different. This underlying policy has little relevance to a trial flawed by the errors or omissions of inadequate counsel. The Solicitor General's false analogy mocks the importance of the Sixth Amendment.

of the offense or the strength of the prosecution to overshadow counsel's obligations, the outcome determinative standard threatens to steer the federal courts towards the untenable position that there may be no need for adequate counsel for certain types of cases or individuals. Any standard that has such fundamental flaws should be soundly rejected by the Court.

2. The Proper Test of Prejudice Requires A Habeas Petitioner To Demonstrate That Counsel's Serious Derelictions Impaired The Defense.

The above discussion reveals the evident superiority of a standard of prejudice that focuses on the impairment to the defense caused by counsel's inadequacies. Simply put, as the overwhelming majority of circuits recognize, when defense counsel is ineffective, the representation of the defendant is "not a product of an adversary, but a flaw in the adversary process." McQueen v. Swenson, 498 F.2d at 218-19. This taint

can only be neutralized by inquiring into "whether counsel's incompetence impaired [the] defense, not whether the defendant would have been convicted in spite of these errors." United States v. Tucker, 716 F.2d at 587. See also McQueen v. Swenson, 498 F.2d at 220; United States ex rel Green v. Rundle, 434 F.2d at 1115. Cf. United States v. Morrison, 449 U.S. at 365.

The standard is also sufficient to guard against baseless attacks on counsel. It first requires a showing that counsel's failings breached the basic responsibilities of reasonably competent counsel. Insignificant or insubstantial errors by diligent counsel would hardly serve to overturn a conviction or sentence. McMann v. Richardson, 397 U.S. at 711. Then there must be a showing that counsel's errors actually impaired the presentation of the defense. For example, if a motion to suppress were not filed, but the evidence could not have been

excluded, there would have been no impairment of the defense. Chambers v. Maroney, 399 U.S. at 53-54. Similarly, if there has been a failure to investigate, but there is nothing that could have been uncovered or the omitted evidence would be cumulative, then the presentation of the defense has not been impaired. Avery v. Alabama, 308 U.S. at 452.

Even if a habeas petitioner could show impairment to the defense, the State could still establish that the denial of the right to effective assistance of counsel was harmless in light of the entire record. See, e.g., United States v. Tucker, 716 F.2d at 588; Washington v. Strickland [Pet. App. 75-76].

As at other points in the consideration of ineffective assistance claims, courts will necessarily have to retain flexibility in the application of this standard to specific cases. While considerations of prejudice do not lend themselves to categorical

rules, there are several factors that should be considered in weighing the extent to which the defense was impaired in a particular case.

First, certain defects in counsel's representation are more basic than others because they deprive the defendant of the undivided allegiance of a partisan and zealous advocate. When there is a conflict of interest, Cuyler v. Sullivan, supra; a lack of vigorous advocacy, Anders v. California, supra; physically or mentally debilitated counsel; or the abdication of counsel's basic responsibilities, the defendant has been effectively deprived of "the prized traditions of the American lawyer." VonMoltke v. Gillies, 332 U.S. at 725-26. Since there has been a fundamental failing of counsel in these instances, the degree of prejudice required will be quite different than that necessary when there has been a momentary lapse in counsel's repre-

sentation during trial.

Second, the pervasiveness of counsel's inadequacies must also be considered. The prejudice to the defense of an isolated error at trial may be more easily discernible than the impact of errors that pervade the entire trial. United States v. Porterfield, 624 F.2d. 122, 124-25 (10th Cir. 1980); United States ex rel. Green v. Rundle, 424 F.2d at 1115. United States v. Morrison, 449 U.S. at 365 n.2.

Third, the effect of counsel's failings that result in an impoverished record must be approached quite differently than other errors whose impact on the defense is more easily ascertainable. Without adequate investigation or preparation, it follows "that the record is necessarily incomplete as to the extent of the prejudice which resulted from counsel's derelictions." United States v. Tucker, 716 F.2d at 593. Cf. Michel v. Louisiana, 350 U.S. 91, 100-01 (1955);

White v. Ragen, 324 U.S. at 762, 764; Avery v. Alabama, 308 U.S. at 447.

Fourth, just "as the severity of the sentence [in a capital case] mandates careful scrutiny in the review of any colorable claim of error," Zant v. Stephens, 103 S.Ct. at 2747, so too do "capital cases demand special efforts by counsel and special sensitivity by courts to the impact of counsel's actions." [S.G. 11 n.3].

A fifth factor to consider is the nature and subtlety of the issues. Where the issue is guilt or innocence, a determination closely bounded by legal rules, the probable effect upon the defense of counsel's failure to locate witnessess or evidence may be undertaken with some degree of confidence. In contrast, in the highly discretionary area of sentencing, the extent to which counsel's inadequate preparation or investigation impaired the defense is much more difficult

to assess. Even under constitutionally valid schemes, "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury is then free to consider a myriad of factors to determine whether or not death is the appropriate punishment." California v. Ramos, ___ U.S. ___, 103 S. Ct. 3446, 3456 (1983); Zant v. Stephens, 103 S. Ct. at 2756 (Rehnquist, J., concurring). In this context, a showing that counsel failed to uncover readily available and non-cumulative information relevant to the sentencing determination should be sufficient to establish prejudice. See, e.g., Pickens v. Lockhart, 714 F.2d at 1467-68; Voyles v. Watkins, 489 F. Supp. 901, 912 (N.D. Miss. 1980).[57] The simple truth is that the

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57/ It is in this context that the panel's formulation of "helpful", 673 F.2d at 902,

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precise effect of mitigating information on the sentencer in a capital case is inherently indeterminable:

> The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded twelve times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
>
> We cannot determine if other evidence before the jury would neutralize the impact of an error and uphold a verdict. Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty despite any error. Yet who can say that these very factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some inner compulsion and should not die? We are unable to ascertain whether an error which is not purely insubstantial would cause a different

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makes sense. When the decision is the highly discretionary one between life and death, the omission of any evidence regarding the defendant's background or character that would be helpful to the sentencer would represent a substantial impairment to the defense. That is the precise issue the panel was addressing.

> result; we lack the criteria for objective judgment.

People v. Hines, 390 P.2d 398, 402 (Cal. 1964) (emphasis in original). Accord People v. Terry, 390 P.2d 381, 392 (Cal. 1964); Pickens v. Lockhart, 714 F.2d at 1467-68.

The interplay of these factors may take on different meanings in the myriad circumstances confronted by courts. While none of the factors will be dispositive on the issue of prejudice, they should guide the courts in assessing whether the circumstances in a particular case are sufficient to merit relief under the Sixth Amendment.

C. Application of Appropriate Sixth Amendment Principles To The Record In This Case Convincingly Establishes That Respondent Was Deprived of the Effective Assistance of Counsel At His Capital Sentencing Hearing

The application of the basic Sixth Amendment principles articulated above to the present case point unerringly to the conclusion that counsel was ineffective in

failing to conduct any independent investigation for mitigating information about the respondent. Furthermore, this serious error severely impaired the respondent's presentation of his case at a capital sentencing hearing.

First, the stakes were life or death.

Second, the district court explicitly found that Tunkey ceased any preparation or investigation of respondent's case out of a sense of hopelessness and despair after respondent confessed to three murders.[58] [Pet. App. 264; J.A. 300, 302-04, 426]. He never attempted to undertake the role of an active and zealous advocate for his client's life. The integrity and fairness of the adversary proceedings were wholly undermined by the essential withdrawal of defense coun-

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58/ Since Tunkey had not focused on sentencing prior to the confessions (see note 3, supra), the sentencing aspects of petitioner's capital case went totally by default.

sel from the sentencing process.

Third, counsel was unable to provide a "guiding hand" at sentencing because he lacked the indispensable factual prerequisites for the exercise of informed judgment. The district court found as a fact that Tunkey did not seek any witnesses in mitigation [Pet. App. 264-65] nor did he conduct "an independent investigation into petitioner's background and potentially mitigating emotional and mental reasons for the killings." [Pet. App. 282]. Without this factual information, counsel could do little more than rely on respondent's statements at the guilty plea proceedings [J.A. 322-23]; he certainly could not meaningfully advise the respondent on what mitigating information could and should be presented to the sentencer.[59] Tunkey's "total abdication

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59/ Tunkey's recollection that the respon-

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of duty should never be viewed as permissible trial strategy." Pickens v. Lockhart, 714 F.2d at 1467.[60]

59/ continued

dent did not want anyone at his sentencing hearing [J.A. 408] was not credited by the district court as the reason for Tunkey's failure to investigate. In any event, a criminal defendant is hardly able to make a decision on what options to pursue without counsel's sound advice. Yet, Tunkey was unable to discharge this responsibility because he lacked the essential factual ingredients that an adequate investigation would have provided. Any other requirement in the Sixth Amendment area would allow the use of the accused's ignorance of the law and facts as an excuse for counsel's inadequacies when it is this very ignorance that makes diligent preparation by counsel indispensable to the defendant.

60/ Even assuming an attorney could make a tactical judgment in a capital case without adequate investigation of mitigating evidence, the record shows that Tunkey never made the judgment now attributed to him by the petitioners. [Pet. Br. 98-100]. He did in fact attempt -- albeit wholly ineffectively -- to place information before the sentencing judge about petitioner's character and background, as well as the circumstances surrounding the offenses. He also argued to Judge Fuller in support of a life sentence that David Washington "possesses somewhere within him a spark which is good,

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Fourth, counsel's inadequate preparation resulted in the impoverishment of the record, depriving the sentencer of the knowledge about the character and background of the defendant that is indispensable to an "individualized determination" of whether life or death is the proper punishment. Zant v. Stephens, 103 S. Ct. at 2743-44; Eddings v. Oklahoma, 455 U.S. 104, 110-112 (1902); Woodson v. North Carolina, 428 U.S. at 304.

Fifth, the subtle influences that are involved in reaching a life or death decision under Florida law make it particularly difficult to assess the impact of counsel's

60/ continued

which is decent." [J.A. 322]. Without evidence in mitigation demonstrating that respondent's crimes were the product of unusual mental and emotional pressures, and were wholly inconsistent with his character or prior history, a plea for mercy on the basis of "a spark which is good, which is decent," lacked any detectable factual foundation and was hardly likely to impress a judge.

errors upon a record thus impoverished. Under Florida's capital sentencing scheme, "even if the statutory threshold has been crossed and the defendant is in the narrow class of persons who are subject to the death penalty, the sentencing authority is not required to impose the death penalty." Barclay v. Florida, 103 S. Ct. at 3431. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Indeed, the Florida courts have developed a series of precedents "in which, even though statutory mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of non-statutory mitigating circumstances tips the scales in favor of life imprisonment." Barclay, 103 S.Ct. at 3431-3432. Numerous Florida cases emphasize the critical, often determinative, significance of non-statutory mitigating circumstances in the life or

death decision.[61] Counsel's inadequacies in the present case deprived respondent of the non-statutory mitigating information that Florida sentencers have repeatedly employed in their capital sentencing calculus.[62]

61/ See, e.g., McCampbell v. State, 421 So. 2d 172 (Fla. 1982) (life sentence based on exemplary employment record, potential rehabilitation, and family background); Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982) (evidence of potential rehabilitation must be considered); Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982) (life sentence based on good character); Moody v. State, 418 So. 989, 995 (Fla. 1982) (error in failing to consider personality change following return from war and destorted religious beliefs of the defendant); Neary v. State, 384 So. 2d 881, 885-87 (Fla. 1980) (life sentence based on various non-statutory mitigating factors, including family background and slow learning capacity of defendant); Shue v. State, 366 So. 2d 387, 389-90 (Fla. 1978) (life sentence based on family background of brutality and deprivation); Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975) (life sentence based on emotional strain from victim's mistreatment of girlfriend).

62/ The importance accorded non-statutory mitigating circumstances by Florida courts

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In sum, respondent has shown that he did not receive representation within the range of competence demanded of attorneys in criminal cases and that counsel's ineffectiveness impaired the presentation of the defense at his capital sentencing hearing.

III.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT TESTIMONY OF THE STATE SENTENCING JUDGE ON THE ISSUE OF PREJUDICE WAS INADMISSIBLE

At the evidentiary hearing in the district court, the state sentencing judge [Judge Fuller] was allowed to testify, over petitioner's objections, about the weight he had accorded to the aggravating and mitigating circumstances that he found were present in this case [J. A. 457-460] and about

62/ continued

(supra at note 61) belies petitioners' assertion that the prejudice to the respondent is somehow diminished by the fact that counsel's dereliections pertained to non-statutory mitigating information. [Pet. Br. 98-99; S.G., 9-12].

whether the evidence that could have been presented by constitutionally adequate counsel would have altered his sentencing determination. [J.A. 461-463; 478-479]. Although the district court did "not treat[] Judge Fuller's testimony" as determinative on the issue of prejudice" [Pet. App. 285], it did "consider[] Judge Fuller's testimony" [Pet. App. 285] in finding that no prejudice resulted from inadequate counsel under the outcome-determinative standard.

The court of appeals was correct in concluding that the district judge erred in considering this testimony.

First, the state judge's testimony is irrelevant to the proper standard for assessing prejudice from counsel's ineffectiveness. As discussed above, the appropriate focus of inquiry should be on the impairment to the defense, not the outcome of the sentencing proceeding.

Second, the testimony of the sentenc-

ing judge violates the well-settled principle that a judge should not be questioned about his mental processes in reaching a decision. In Fayerweather v. Ritch, 195 U.S. 276 (1904), the Court held:

> [T]he testimony of the trial judge, given six years after the case had been disposed of, in respect to matters he considered and passed upon, was obviously incompetent. . . . [N]o testimony should be received except of open and tangible facts - matters which are susceptible of evidence on both sides.

Id. at 306-07.

Since then, the Fayerweather principle has prohibited, without exception or qualification, any testimony that probes or compromises the mental processes of a decision-maker in formulating a judgment. See, e.g., United States v. Morgan, 313 U.S. 409, 422 (1941); Chicago B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593 (1907); United States v. Crouch, 566 F.2d. 1311, 1316 (5th Cir. 1978); National Labor Relations Board v. Air Associates, 121 F.2d 586, 591 (2d Cir. 1941).

Petitioners are unable to point to any case - state or federal - that has upheld the admissibility of a state judge's subjective processes. 28 U.S.C. § 2245, upon which petitioners rely, is clearly inapposite; the express terms of the statute relate to a certificate "setting forth the facts occurring at the trial,"[63] not the judge's mental processes. Id. (emphasis added). Furthermore, the Court's decisions in Gardner v. Florida and United States v. Tucker do not support the admissibility of such testimony. [Pet. Br. 102, 103, 105]. In neither Gardner nor Tucker did the Court send the case back to the sentencer to

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63/ 28 U.S.C. § 2245 provides in pertinent part:

> On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence.

determine whether it would have reached the same result without the taint.[64] Instead, in both cases the Court required the sentencer to conduct a new sentencing hearing.[65]

Petitioners' contention that the judge's testimony was admissible as opinion evidence

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64/ In Gardner, the flaw was a failure to disclose information in a pre-sentence report to defense counsel; in Tucker, the error was the consideration at sentencing of prior invalid convictions.

65/ There is also no decision in the circuits that justifies the admissibility of this testimony. Cases where testimony or a certificate of a state sentencing judge has been considered generally involve the judge's opinions on counsel's competency or matters of basic, historical fact. See, e.g., Haggard v. Alabama, 550 F.2d 1019, 1022 (5th Cir. 1977); Williams v. Beto, 354 F.2d 698, 703 (5th Cir. 1965). Such testimony does not implicate the Fayerweather principle. [Pet. App. 76-77].

Other cases cited by the petitioners [Pet. Br. 102] never considered the admissibility under Fayerweather of testimony relating to a sentencing judge's mental processes. See Hampton v. Wyrick, 588 F.2d 632, 633-34 (8th Cir. 1979) Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978).

under Federal Rule of Evidence 704[66] [Pet. Br. 101-02] is simply not supportable. Nothing in Rule 704 or its commentary justifies the novel assertion that this provision tacitly overrules the longstanding Fayerweather doctrine.

It is easy to understand the unqualified adherence to Fayerweather, since there are sound reasons underlying the rule. Its primary rationale, of course, is that a judge's written orders or orally pronounced judgments should stand complete in themselves and not be undermined by after the fact testimony. Additionally, as the court of appeals recognized, "a rule that allows the probing of the mental processes of a state judge would exacerbate certain pro-

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66/ This rule states:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

blems that are already inherent in the habeas corpus context." [Pet. App. 79]. While in this case the testimony was used to sustain a judgment, fundamental notions of fairness would require that litigants seeking to impeach a judgment be afforded a similar opportunity. This would inevitably subject state court judges to probing and wide ranging inquiries into their subjective processes of decision-making in all sorts of situations.

Furthermore, petitioners' argument has no discernible limits. There is plainly no basis for distinguishing between the judge in the present case and the members of the sentencing jury in those states where the jury is involved in the sentencing process (like Florida) or makes the definitive sentencing decision.[67] The disastrous

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67/ Fayerweather itself was based on Packet Co. v. Sickles, 72 U.S. (5 Wall.)

(footnote continues on following page)

consequences of opening up state court jury deliberations to inquiry in federal courts are self-evident.

Finally, contrary to petitioners' suggestion [Pet. Br. 105], it is extremely doubtful that the Fayerweather rule would be relaxed if the habeas petitioner in a death case sought the admission of favorable testimony regarding a sentencing judge's mental processes. [Pet. Br. 104]. Fayerweather and its progeny set forth an unqualified rule excluding such testimony. See United States v. Crouch, 566 F.2d at 1316. Circumstances could conceivably arise in which a modification of the rule in favor of a death-sentenced petitioner would be required by either the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment, cf. Green v. Georgia, 442 U.S.

66/ continued

580, 593 (1866) which prohibited inquiries into the mental processes of jurors.

95, 97 (1979), but that is true of any evidentiary rule in extraordinary cases. See, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973). It is no reason for abandoning the rules of evidence.

In sum, the record reflects that the district judge explicitly considered evidence which is both (1) irrelevant to the proper standard for assessing prejudice under the Sixth Amendment, and (2) patently inadmissible under settled rules of evidence based on sound policy considerations. Since there is no means of determining the extent to which this incompetent evidence affected the district court's analysis of respondent's claims, reversal is required to ensure adjudication of these claims uninfluenced by consideration of the inadmissible testimony.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be

affirmed, and the case should be remanded to the court of appeals for further proceedings consistent with the analysis, as set forth above, of claims of ineffective assistance of counsel under the Sixth Amendment.

Respectfully submitted,

JOSEPH H. RODRIGUEZ
PUBLIC DENFENDER

By: _____
RICHARD E. SHAPIRO

November 29, 1983

Appendices

APPENDIX A

Q. [Counsel for Washington] So that the record is complete, prior to the sentencing hearing, you never obtained or requested a psychiatric or psychological examination of David Washington; is that correct?

A. [Tunkey] No, I never requested one, that is correct. That is 100 percent correct.

Q. And also, prior to the December 6th sentencing hearing --

A. I never asked for one.

Q. -- you had not conducted any interviews or investigations of people who might have been familiar with David Washington's background, childhood or activity in the community?

A. I believe that to be essentially correct, with the exception of my conversations with David himself and what

brief conversations I had with his wife on the phone.

Q. From you knowledge of David Washington's background gleaned from discussions with him and your knowledge about the crimes of which he was charged or at that point of which he had been convicted, did you see, in your judgment, that there was a great disparity from what you had understood David Washington's past to be and the crimes of which he was convicted?

A. It was like night and day.

Q. So, you saw the tremendous difference between the person.

Did you also see the difference between the person you were interviewing and working with as a client and the person who had been charged and convicted of these crimes?

A. So far as I could tell, the

answer to that question, from my numerous interviews with David, the answer to that question was that there was just an absolutely inexplicable difference between the personality which I knew as compared to the crimes charged and the admissions which he had made.

Insofar as admitting that he had done these various things was an inexplicable kind of circumstance.

Q. Did you at any point in time consider that psychiatric or psychological examination would have been useful for you in understanding Mr. Washington's behavior and preparing for his sentencing hearing?

A. No.

Q. You did not? Did you request a pre-sentence investigation prior to the sentencing hearing?

A. Not that I recall [Transcript continues after ellipsis on J.A. 404].

APPENDIX B

First Circuit: United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978) ("[T]he quality of a defense counsel's representation should be within the range of competence expected of attorneys in criminal cases."); United States v. Fusaro, 708 F.2d 17, 26 (1st Cir. 1983) (same).

Third Circuit: Moore v.United States, 432 F.2d 730, 736 (3d Cir. 1970) ("[T]he standard of adequacy of legal services . . . is the exercise of the customary skill and knowledge which normally prevails at the time and place."); United States ex. rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982) (same).

Fourth Circuit: Marzullo v. State of Maryland, 561 F.2d 540, 543 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) (Defense counsel's representation must be

"within the range of competency demanded of attorneys in criminal cases"); Arthur v. Bordenkircher, 715 F.2d 118, 119 (4th Cir. 1983) (same).

Fifth Circuit: MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), rev'd on other grounds, 289 F.2d 928 (en banc), cert. denied, 368 U.S. 877 (1961). (Sixth Amendment guarantee entitles defendant to "counsel reasonably likely to render and rendering reasonably effective assistance"); United States v. Rusmisel, 716 F.2d 301, 304 (5th Cir. 1983) (same).

Sixth Circuit: Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). (The Sixth Amendment guarantees "counsel reasonably likely to render and rendering reasonably effective assistance" and "defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law.")

These standards are used interchangeably. See, e.g., Adams v. Jago, 703 F.2d 978, 980 (6th Cir. 1983); United States v. Martin, 704 F.2d 267, 274 (6th Cir. 1983).

Seventh Circuit: United States ex. rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975), cert. denied, 423 U.S. 876 (1975) ("[T]he Constitution guarantees a criminal defendant legal assistance which meets a minimum standard of professional representation."); United States v. Zylstra, 713 F.2d 1332, 1338 (7th Cir. 1983) (same).

Eighth Circuit: Morrow v. Parratt, 574 F.2d 411, 412 (8th Cir. 1978) ("[T]he defendant must show that his attorney failed to exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances."); Lufkins v. Solem, 716 F.2d 532, 539-540 (8th Cir. 1983) (same).

Ninth Circuit: Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979) ("[E]ffective assistance means assistance within the range of competence demanded of attorneys in criminal cases.")

Tenth Circuit: Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1979) (en banc), cert. denied, 445 U.S. 945 (1980) ("The Sixth Amendment demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney"); United States v. Glick, 710 F.2d 639, 644 (10th Cir. 1983) (same).

Eleventh Circuit: King v. Strickland, 714 F.2d 1481, 1485 (11th Cir. 1983) ("The sixth amendment guarantees a criminal defendant the right to counsel reasonably likely to render, and rendering, reasonably effective assistance");

Wiley v. Wainwright, 709 F.2d 1412, 1413 (11th Cir. 1983) (same).

District of Columbia Circuit: United States v. DeCoster, 624 F.2d 196, 208 (D.C. Cir.) (en banc), cert. denied, 444 U.S. 944 (1979) ("The claimed inadequacy must be a serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers."); United States v. Green, 680 F.2d 183, 188 (D.C. Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1204 (1983) (same).

The Second Circuit is the only circuit which still retains the "farce and mockery" standard. United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950) ("A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and

make the proceedings a farce and mockery of justice."); United States v. Maniego, 710 F.2d 24, 27 (2d Cir. 1983) (same).

APPENDIX C

Ten Circuits require a habeas petitioner to bear the burden of proof on the issue of prejudice.

First Circuit: United States v. Campa, 679 F.2d 1006, 1014 (1st Cir. 1982) (Petitioner bears burden of establishing actual prejudice).

Second Circuit: LiPuma v. Commissioner, Dept. of Corrections, State of New York, 560 F.2d 84, 92 (2d Cir. 1977), cert. denied, 434 U.S. 861 (1977) (Petitioner must prove actual and not possible prejudice).

Third Circuit: United States ex rel. Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970) (Petitioner must demonstrate prejudice where discrete errors of counsel are alleged, but not where there are claims of pervasive incompetence).

Fifth Circuit: Washington v. Watkins, 655 F.2d 1346, 1362 (5th Cir. 1981), cert denied, 456 U.S. 949 (1982).

Seventh Circuit: United States v. Berkwitt, 619 F.2d 649, 659 (7th Cir. 1980); but see, United States ex rel. Healey v. Cannon, 553 F.2d 1052, 1057 n. 7 (7th Cir.), cert. denied, 434 U.S. 874 (1977) (suggesting no showing of prejudice is required).

Eighth Circuit: Lufkins v. Solem, 716 F.2d 532, 540 (8th Cir. 1983); Morrow v. Parratt, 574 F.2d 411, 412-13 (8th Cir. 1978).

Ninth Circuit: United States v. Tucker, 716 F.2d 576, 588 (9th Cir. 1983); Cooper v. Fitzharris, 586 F.2d 1325, 1331 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979).

Tenth Circuit: United States v. Glick, 710 F.2d 639, 644 (10th Cir.

1983); United States v. Golub, 694 F.2d 207, 215-16 (10th Cir. 1982). In certain instances, however, the Tenth Circuit does not require a showing of prejudice. United States v. Cronic, 675 F.2d 1126, 1128 (10th Cir. 1982), cert. granted, ___ U.S. ___ (1983), and where incompetence of counsel is pervasive, the government bears the burden of establishing the lack of prejudice. United States v. Payne, 641 F.2d 866, 867-68 (10th Cir. 1981); United States v. Porterfield, 624 F.2d 122, 124-25 (10th Cir. 1980).

Eleventh Circuit: King v. Strickland, 714 F.2d 1481, 1488 (11th Cir. 1983).

District of Columbia Circuit: United States v. Decoster, 624 F.2d 196, 208 (D.C. Cir. 1979) (en banc), cert. denied, 444 U.S. 944 (1979).

The Fourth Circuit only requires the petitioner to demonstrate that his counsel failed to meet certain minimum requirements. Once any of these requirements has not been satisfied, the petitioner is entitled to relief unless the State can show that the lawyer's derelictions were harmless. Wood v. Zahradnick, 578 F. 2d 980, 982 (4th Cir. 1978); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968), cert. denied, 393 U.S. 849 (1968).

The Sixth Circuit does not require any showing of prejudice once petitioner has established that counsel failed to render reasonably effective assistance. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).